IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1225 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PRAVIN @ PANIO LALJI KATHIWADIA & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR SR DIVETIA FOR MUKESH D RAVAL for Appellant(s) : 1.
MR JM JADAV for appellant No.2.
MR. PD BHATE, APP, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 14/06/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. The appellants have preferred this appeal under

Section 374 (2) of the Code of Criminal Procedure, 1973, and challenged the judgment passed by the learned Addl. Sessions Judge, Surat in Sessions Case No.98 of 1996 on 23rd October, 1996 by which they are convicted for the offence punishable under Sections 302 read with Section 34 of the I.P. Code and Section 135 of the Bombay Police Act and sentencing to undergo life imprisonment and pay fine of Rs.500/-, in default thereof, to undergo simple imprisonment of one month for the offences punishable under Section 302 read with Section 34 of the I.P. Code. No separate sentence is imposed on them for the offence punishable under Section 135 of the Bombay Police Act.

2. The facts emerging from the prosecution case, in brief, are that complainant Pravinbhai Shantilal Dhimmar lodged a compliant before Chwok Bazar Police Station on 26-11-1995 at about 18-30 hours stating that when he was selling vegetables in his lorry at Saiyadpura market at around 5-00 O'clock in the evening his cousin brother Bhagubhai Durlabhbhai came to him and they were standing after placing order for tea to the son of Iqbalbhai. At that time the appellants came with knife in their hands. Appellant No.1 Pravin @ Panio tried to give knife blow to Bhagubhai but he escaped as a result the knife slipped and cut through his shirt. Bhagubhai ran towards Jalaram Cycle and Cold Drink shop. The appellants chased Bhagubhai and intercepted him and started giving knife blows on his person.

Therefore, the complainant went to Ranitalav Police Chowki and informed the police about the incident. The complainant and the police came at the place where Bhagubhai was found lying dead. According to the complainant, Champakbhai Mohanbhai Rathod and others were present at the time of the incident. The motive for the incident as stated by the complainant was that the appellants had grudge against said Bhagubhai because of previous quarrel and that was the reason why he was assaulted and killed.

3. On the basis of the complaint, investigation was started. During the course of the investigation the appellant No. 1 Pravin @ Panio was arrested on 9-12-1995 and the appellant No.2 – Kishorbhai was arrested on 7-12-1995. One Manilal Khushalbhai Kahar was also arrested.

4. On completion of the investigation, the charge sheet was laid before the learned Judicial Magistrate, First Class, Surat. The offence being exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, Surat and it was registered as Sessions Case No. 98 of 1996. The learned Additional Sessions Judge, Surat framed charge Exh.5 against the appellants and said Manilal Khushalbhai Kahar for the offences punishable u/s 302 read with Section 34 and Section 120-B of the I.P. Code and under Section 135 of the Bombay Police Act. The appellants and said Manilal Khushalbhai Kahar

pleaded not guilty to the charge and demanded trial. Therefore, the prosecution adduced evidence. On completion of recording of evidence by prosecution, the learned trial Judge explained to the accused the circumstances appearing against them in the evidence and recorded their further statement u/s 313 of the Code of Criminal Procedure, 1973. In the further statements the appellants have denied having committed the offences levelled against them.

5. After hearing the learned counsel for the parties, the learned trial Judge came to the conclusion that the appellants have committed the offences punishable u/s 302 read with Section 34 of the I.P. Code as well as the offence punishable u/s 135 of the Bombay Police Act and directed them to undergo sentence as mentioned hereinabove. Other accused Manilal Khushalbhai Kahar was acquitted for the offences charged against him.

6. Learned advocate Mr. S.R. Divetia for learned advocate Mr. M.D. Rawal for the appellants submitted that the prosecution has failed to prove the case against the appellants beyond reasonable doubt. It was argued that the complainant was a close relative of the deceased and on analysis of his evidence and the evidence of other witnesses, it is clear that the witnesses did not speak truth and their evidence is not reliable. It was pleaded that there are serious discrepancies in the evidence and therefore their evidence should not have been relied upon.

According to the learned advocate for the appellants, the prosecution has not examined any independent witnesses though the alleged offence was committed in a public place like open market for which adverse inference should be drawn against the prosecution. He also submitted that the complaint refers to the presence of one Champakbhai Mohanbhai whereas the complainant in his oral deposition has made reference about witness – Imran but both these witnesses are not examined and therefore the prosecution case should be disbelieved. It was argued that there is change in the version of the complainant and as investigation is not properly conducted and biased investigation is made with a view to rope the appellants in the offence. The learned counsel placed reliance on the decision in **Joseph s/o Kooveli Poulo Vs. State of Kerala, reported in (2000) 5 Supreme Court Cases 197** and submitted that the impugned judgment and order of conviction passed by the learned trial Judge should be set aside.

7. The learned Addl. Public Prosecutor Mr. P.D. Bhate, vehemently opposed the appeal and supported the judgment. He submitted that the eye witnesses have supported the prosecution case and as their evidence is supported by the medical evidence the conviction of the appellants is well founded and should be upheld. He submitted that merely because the complainant is relative of the deceased, his testimony cannot be discarded more particularly when

his presence at the time of incident is not in doubt. It was argued that the panchanama of recovery of weapons also indicates that the deadly weapons were used in the commission of the offence, and therefore, judgment and order of conviction does not require any interference by this Court.

8. We have considered the rival submissions and have gone through the judgment as well as Record of the case.

9. The fact that the deceased died a homicidal death is not in dispute before us. The testimony of the complainant indicates that knife blows were inflicted on the deceased. The medical officer who performed postmortem has enumerated the injuries in the postmortem notes. Thus, looking to the evidence adduced by the prosecution it is clear that the deceased died a homicidal death.

10. In order to prove the charge, the prosecution has examined P.W. 8 Dr. Rakesh Harendranath Tondon at Exh. 32, P.W. 10 Ramanbhai Manabhai Bhil, Police Constable of Ranitalav Police Station before whom the informant allegedly gave information about the incident at Exh.35, P.W. 13 Natvarsinh Arjunsinh Solanki the Investigating Officer who recorded the complaint (Exh.15) at Exh.38 and P.W. 15 Manilal Premchand Asarasa, Investigating Officer at Exh.41.

11. The prosecution has also examined panch

witnesses to prove the panchanama of scene of offence, panchnama of discovery of weapons and clothes of the accused. However, these witnesses have turned hostile and have not supported the prosecution case.

12. The complainant P.W. 1 Pravinbhai Shantilal has in his evidence recorded at Exh.14 stated that the incident took place on 26-11-1995 at about 5-00 O'clock in Saiyadpura Market. According to this witness, he was selling vegetables at the market when Bhagubhai came to him and both were standing. At that time, the appellants came with open knives from behind and appellant No.1 Pravin @ Panio inflicted knife blow on the stomach of Bhagubhai but the knife slipped and cut through shirt. So Bhagubhai ran towards Jalamram Cycle and Cold Drink shop. The appellants chased and intercepted Bhagubhai and inflicted knife blows. He got frightened and hence he went to Ranitalav Police Chowky and informed police who came at the place of offence with him. They saw that Bhagubhai has died. Thereafter, he came to Ranitalav Police chowky and gave complaint Exh.15. The witness has stated that tea-stall of Iqbalbhai was away at a distance of 30 – 35 feet from the place of the incident and Imran, the son of Iqbalbhai was present at the tea-stall. He has also stated that a rickshaw passed from nearby at the time of incident. In the cross-examination the witness has stated that the incident was witnessed by him and Imran only and no others have witnessed

the incident. He has also stated that it took about 1 ½ minutes to reach to police chowky and within 1 ½ to 2 minutes police came with him at the place of incident. He has also stated that they remained there for about 5 to 7 minutes and he returned to police chowky with the policemen where he remained till 7-00 O'clock. The police started recording his complaint at 6-05 p.m. and it took about 25 minutes. In light of this evidence, the evidence of the policeman, who was first allegedly informed about the incident, is required to be reappreciated.

13. P.W. 10 Ramanbhai Manabhai Bhil Exh. 35 is the Police-Constable before whom the information with regard to the incident was given. The witness has stated that he was on his duty of attending telephone at Ranitalav Police Chowky. At that time one frightened person came at the gate and informed him that a man named Bhagubhai has been killed at Saiyadpura Market. After saying so the said person left and therefore he went to Saiyadpura Market to verify the fact. Thereafter he returned at the gate and informed P.S.O. of Chowkbazar Police Station on telephone that murder of Bhagubhai has been committed. In the cross-examination, the witness has stated that the person who informed him about murder of Bhagubhai was a person from the public and thereafter he has not seen that person. He has further stated in his cross-examination that except this person, no other person had come to him to inform about the incident. In view of this evidence,

it becomes clear that this witness received information about the incident from a person who left the police chowky after giving the information and thereafter the witness never met that person. It also transpires from the evidence that on receiving information about the incident the witness alone went to the place of incident. This evidence is contradictory to the evidence given by the complainant p.w.1 Pravinbhai Shantilal Exh.14 who has stated that he went to police chowky, informed about the incident, went to the place of incident with four policemen, returned to police chowky with two policemen and his complaint was recorded at police chowky. In view of this contradiction, it would be difficult to accept the testimony of P.W. No. 1 Pravinbhai Exh.14.

14. The prosecution has examined the Investigating Officer P.W. 13 Natvarsinh Arjunsinh Solanki at Exh. 38. He has deposed that he went to the place of the incident and recorded the complaint Exh.15 as narrated by Pravinbhai Shantilal and forwarded the same to P.S.O. Mr. Pavagadhi with Yadi Exh.39. He has also deposed that during the investigation he had recorded the statements of Manilal Khushal, Champak Mohan Rathod, Mohmed Abdulnabi Panagar, Mumtaz, daughter of Abdulnabi, Girdhar etc. In the cross-examination, the witness has stated that he reached at the place of the incident at about 18-05 hours and started recording the complaint there and it was completed at 18-15 hours and thereafter it was

sent to the police station. This indicates that the complaint was recorded at the place of the incident by the witness.

15. According to P.W. 1 Pravinbhai Shantilal Exh.14, the police started writing his complaint at 6-05 O'clock and it lasted for about 25 minutes and completed at 6-45 p.m. P.W.13 Natvarsinh Exh. 38 has stated in his deposition that he started writing the complaint at 18-05 hours and completed it 18-15 hours. These versions are contradictory to each other.

16. The complaint Exh.15 indicates that the offence was disclosed at about 18-15 hours and the offence was registered at 18-30 hours on 26-11-1995. Yadi Exh.39 indicates that the offence was registered at 18-30 hours. In view of this evidence, there are different versions about the time and place of recording of the complaint. It does not become clear as to who went to Rani Talav Police Chowky to give information about the incident and how the compliant came to be recorded. This evidence is contradictory to the evidence of the complainant. Therefore, there are serious discrepancies about the time and place of recording of the complaint.

17. In the complaint Exh.15, the complainant has specifically alleged that one Champak Mohan Rathod was present at the time of the incident. The Investigating Officer has recorded the statement of

said Champak Mohan. However, strangely said witness has not been examined.

18. The prosecution has examined P.W. 4 Mohmedbhai Abdulnabi Exh. 23 who has allegedly seen the incident. The witness has stated that on the day of the incident at about 4-45 p.m. he was going to his in-laws' place at Saiyadpura Market in auto rickshaw with Mumtaz. When he was passing by Saiyadpura market two persons were giving knife blows to one person. He has also stated that after shouting he went away in his auto-rickshaw. In the cross-examination, the witness has admitted that he knew deceased Bhagubhai since childhood. He has also stated that at the place of incident about 30 to 40 persons had assembled and he did not go inside the crowd. Oral testimony of this witness indicates that this witness knew victim Bhagubhai since long. According to the witness, he knew the deceased since childhood but did not know the appellants. The witness claims to have seen the incident but does not stop at the place of incident. If he knew the victim since childhood, he would have stopped at the place of incident and would have tried to make inquiry about the assailant and cause of attack. The conduct of this witness is therefore not natural. The complaint Exh. 15 does not mention about passing of any auto-rickshaw but P.W. 1 Pravinbhai has for the first time in his deposition stated about passing of auto-rickshaw. These factors collectively make claim of this witness of being eye

witness doubtful. In our view, only with a view to support the case of passing of auto-rickshaw, this witness has been examined. The evidence of this witness does not inspire confidence.

19. Complaint at Exh.15 indicates that one Champak Mohan was present at the time of the incident. However, in oral deposition of the complainant P.W. 1 Pravinbhai at Exh.14, the witness has not stated about presence of Champak Mohan and has improved his version by stating that auto-rickshaw had passed near the place of the incident at the time of occurrence. In our view, this improvement is made with a view to suit the prosecution case. Therefore, in our opinion, the evidence of the complainant P.W. 1 Pravin cannot be relied on to convict the appellants – accused on account of this defect besides the other defects indicated in earlier part of this judgment.

20. The incident took place in a public place like market in a broad day light. The Investigating Officer P.W. 13 Natvarsinh Arjunsinh Solanki Exh.38 has stated that he had recorded the statement of several witnesses. The witnesses examined are the relatives or friend of deceased Bhagubhai. The statements of independent witnesses have been recorded but no independent witness has been examined. No explanation or justification comes from prosecution. These factors raise doubt about truthfulness of prosecution case.

21. P.W. 15 Manilal Premchand Asarasa Exh.41 who was entrusted with further investigation had recorded the statement of co-accused Manilal Khushalbhai Kahar as an eye witness. However, the said witness Manilal was arraigned as an accused in this case. This conduct of the Investigating Officer raises doubt about the conduct of the investigation. Looking to the nature of evidence adduced by the prosecution, in our view, the prosecution has failed to prove the case beyond reasonable doubt against the appellants.

22. The prosecution has produced the panchnama of clothes of appellant No. 1 – Pravin @ Panio at Exh.28. In order to prove the panchnama, the prosecution has examined panch Exh. 5 Ranjitsinh Bhagwandas at Exh.27. It appears from his evidence that he was called at the police station where appellant No.1 – Pravin @ Panio was present wearing the clothes which were blood stained. The clothes were recovered by making panchnama Exh.28. It appears that the witness knew Bhagubhai since last 12 years and he knew Bhagubhai's wife also. He was called by the police from his house at Varaiyali Bazar which is away at a walking distance of 10 to 15 minutes from Chowk Bazaar Police Station. There is Municipal Corporation Office and L.I.C. Office in between the police station and his house. The policeman Bhikhubhai who had come to call him was known to him. It also appears that the locality where

the police station is situated is a busy locality. It is very strange that a panch is called from such a long distance instead of calling a panch from a nearby place. The panch is also known to the deceased, his family and police. As against this evidence, if we look at the evidence of P.S.I. of Chowk Bazar Police Station P.W. 14 Arjun Tulsiram Exh. 40 it appears that muddamal article light green coloured shirt with blood stains allegedly worn by appellant No. 2 Kishorbhai at the time of committing the offence with other articles was discovered at the instance of appellant No.1 Pravin @ Panio under the panchnama Exh.45 from Daman. These articles were discovered from a public place. The panchnama was drawn on 12-12-1995. It would be difficult to believe that the articles were discovered at the instance of appellant Pravinbhai @ Panio after about 16 days of the incident. Therefore, blood stain shirt does not connect appellant No. 2 Kishorbhai with the offence. Moreover, it appears from the contents of panchnama Exh.28 that appellant No. 1 - Pravinbhai @ Panio was wearing the same shirt when he was produced before Surat Police on 9-12-1995. Once panchnama Exh. 28 is accepted it would mean that appellant No.1 – Pravinbhai @ Panio was wearing the same shirt which he was wearing at the time of commission of offence. It would be difficult to believe that he had continued to wear the blood stained cloth for 13 days after the incident and would move openly wearing such shirt. Thus, blood stained shirt discovered by

panchnama Exh. 28 does not connect appellant No. 1 Pravinbhai @ Panio with the incident in question.

23. According to P.W. 11 Bhikhubhai Maganbhai Patel Exh. 36 the appellant No.1 Pravin @ Panio was arrested from Jadia village and was produced before police station at Surat on 9-12-1995. P.W. 15 Manilal Premchand Exh. 41 – Investigating Officer has admitted that the appellant No.1 – Pravin @ Panio was produced before him on 9-12-1995 at 10-00 a.m. in the morning but the panchnama was made during 17-00 and 17-30 hours i.e. in the evening. According to the prosecution case, the accused had gone to Daman which is 115 k.m. away from the place of the incident to conceal the weapons and cloth worn by the appellant No. 2 i.e. Kishorbhai it would be difficult to believe that the person would travel such a long distance in the same clothes to conceal the weapons used in the commission of offence. This evidence is highly improbable and difficult to accept.

24. The prosecution has examined P.W. 8 Dr. Rakesh Harendranath Tondon at Exh.32 who had carried out postmortem examination of the deceased to prove that the death was homicidal caused with deadly weapons. Postmortem exh.33 report indicates the injuries sustained by the deceased. It is true that this evidence indicates that the deceased was brutally murdered with deadly weapons and met with a homicidal death. However, the prosecution has miserably failed to connect the appellants with the injuries caused

to the deceased. Therefore, it cannot be said that the appellants had inflicted the injuries to the deceased as mentioned in the postmortem examination note which resulted into his death.

25. The prosecution has not adduced any evidence to prove motive behind the incident. Therefore, in our view, the prosecution case suffers from several infirmities.

26. The evidence produced before the trial court is reappreciated and on reappreciation, this Court finds that the prosecution has failed to prove the case beyond reasonable doubt. Therefore, the appellants could not have been convicted on the basis of such evidence. In our view, the appellants are required to be given benefit of doubt.

27. In view of above, looking to the prosecution case as a whole, there are serious discrepancies in prosecution case. In our considered opinion, the trial Court was not justified in convicting the appellants for the offences charged against them. Therefore, the order of conviction and sentence imposed by the trial Court cannot be sustained and the appellants are required to be acquitted for the offences charged against them giving them benefit of doubt.

28. In view of above, the appeal is allowed and the judgment and order of conviction and sentence

passed by the learned Addl. Sessions Judge, Surat in Sessions Case No.98 of 1996 on 23rd October, 1996 is set aside and the appellants are acquitted for the offences charged against them and they are ordered to be set free if not required in any other offence. The fine, if paid, be returned to the appellants.

(A.L. Dave, J.

(Bankim N. Mehta, J.)

/JVSatwara/